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Supreme Court, U.S.
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No. 97-450

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1996

JANE D. HILL, - - - - - - - - - *Petitioner,*

versus

J.J.B. HILLIARD, W.L. LYONS, INC.;
WOLFGANG WILLIAM BRAB;
JAMES C. STONE, III; and
GILBERT L. PAMPLIN, - - - *Respondents.*

On Petition for Writ of Certiorari
To the Kentucky Court of Appeals

BRIEF IN OPPOSITION OF RESPONDENTS EXCEPT BRAB

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14 pp

PARTIES TO THE PROCEEDINGS

The petition accurately lists the parties to the proceeding.

Hilliard-Lyons, Inc. is the parent of J.J.B. Hilliard, W.L. Lyons, Inc. There are no non-wholly owned subsidiaries of respondent, J.J.B. Hilliard, W.L. Lyons, Inc..

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BRIEF IN OPPOSITION OF RESPONDENTS EXCEPT BRAB

COUNTERSTATEMENT OF THE CASE

Jane Hill's (Hill) petition seeks review of the holding of the Kentucky Court of Appeals that her employment claims against her employer, J.J.B. Hilliard, W.L. Lyons, Inc. (Hilliard-Lyons), must be arbitrated under *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991)(*Gilmer*) because she executed a U-4 form agreeing to arbitrate all employment claims she may have against her employer. *Hill* v. *Hilliard*, Ky. App., 945 S.W. 2d 948 (1996).

There is no justification for this Court to review the opinion of the Kentucky Court of Appeals. This Court's decision in *Gilmer* effectively decided the only legitimate issues that Hill raises; Hill presents no compelling reason to revisit *Gilmer*; and, with this petition, Hill raises an issue for the first time that she did not raise with any of the lower courts.

Because this case was resolved by a Rule 12 Motion to Dismiss, the allegations of the complaint are taken as true. In her complaint, Hill seeks damages for alleged assault and battery, intentional infliction of emotional distress, and violations of Chapter 334 of the Kentucky Civil Rights Act for sexual harassment, employment related retaliation, and equal pay. Every claim against Hilliard-Lyons, Gilbert Pamplin, and James Stone relates to action or inaction they took as Hill's employer (or agents of the employer) after Hill accused Brab of raping her during a social outing while on a business trip to New York City.

Hilliard-Lyons is a brokerage firm and a member organization of the major stock exchanges. Pamplin, Stone, Brab and Hill are registered securities representatives. All were employed by Hilliard-Lyons. Brab resigned in late March, 1994. Stone, a former senior Vice-President, has retired. Pamplin is a consultant to the firm, having retired from his position as its chief executive officer. Only Hill is still employed. Hill was employed by Hilliard-Lyons as a stock broker on February 11, 1991. Later, she became vice-president of branch administration and marketing. Prior to her employment, Hill was required to register as a securities representative with regulatory organizations, including two stock exchanges, by completing and signing form U-4, "Uniform Application for Securities Industry Registration or Transfer."

In signing the U-4 form, Hill agreed to submit any dispute, claim, or controversy between herself and Hilliard-Lyons to arbitration. She pledged as follows:

> I agree to arbitrate any dispute, claim or controversy that may arise between me and my firm or customer or any other person, that is required to be arbitrated under rule, constitution or by-laws of the organization listed in Item 10 as may be amended from time to time and that any arbitration award entered against may be entered as a judgment in a Court of competent jurisdiction. (Petition at 4a).

The "organizations listed in Item 10" are the American Stock Exchange, the National Association of Securities Dealers and the New York Stock Exchange. Rule 347 of the New York Stock Exchange Rules provides:

> Any controversy between a registered representative and any member or member organization arising out of employment or termination of employment of such representative shall be settled by arbitration, at the instance of any such party, in accordance with our arbitration procedure described elsewhere in these rules. (Petition at 4a).

Hill alleges in her complaint:

1. On September 29, 1993, Hill and Brab, her supervisor, left Louisville on a business trip to attend a securities industry association convention in New York City. (Complaint, paragraphs 3, 17).
2. Sometime after midnight on October 1, 1993, following a social outing in New York City, Brab raped her. (Complaint, paragraph 19).
3. Nearly three weeks later on October 18, 1993, Hill told Stone of the alleged incident and requested that Hilliard-Lyons do something about it, as her employer. (Complaint, paragraph 23).
4. Stone harassed her in his office during this meeting. (Complaint, paragraph 24).
5. Hilliard-Lyons, Stone and Pamplin breached their duty to protect her and to refrain from taking retal-

iatory action against her in her employment by, among other things:

a. Not providing further job instructions and not separating Hill and Brab. (Complaint, paragraph 30).

b. Not meeting her expectations for a raise and bonus. (Complaint, paragraph 33).

c. Making threatening gestures. (Complaint, paragraph 48).

d. Forcing her to appear in public with Brab at a company function, or lose her job. (Complaint, paragraphs 41, 42).

All of these allegations against Hilliard-Lyons arose out of its relationship to Hill as her employer. Hill seeks back pay, bonuses, future earnings, and fringe benefits. Hill also seeks damages for an Equal Pay Act Violation.

After Hill filed her complaint in the Circuit Court for Jefferson County, Kentucky, all defendants moved to dismiss because Hill agreed to arbitrate any dispute "arising out of employment." The Circuit Court agreed and dismissed her action by an amended Order signed March 6, 1995.

On appeal, the Kentucky Court of Appeals affirmed the Circuit Court's decision as to Hilliard-Lyons, Pamplin and Stone finding that all of Hill's claims against them arose out of the employment relationship. As to Brab, the Court of Appeals held that what Brab is accused of doing - rape away from the office during non-working hours - is independent of the employment relationship. The Kentucky Supreme Court denied Hill's and Brab's Motions for Discretionary Review.

Hill did not allege in her complaint, nor did she file an affidavit, provide other evidence, or argue in any of the lower courts, that her waiver of her right to litigate her

claims against any of the defendants in favor of an arbitral forum was not knowing or voluntary.

REASONS FOR DENYING THE PETITION

A. This Case Presents No Important or Unsettled Questions of Federal Law.

Gilmer resolved the issue raised by Hill. As in *Gilmer*, Hill executed a U-4. Hill brought an action against her employer for sexual harassment, retaliation and violation of the Equal Pay Act. Before filing these claims here Hill filed charges with the Equal Employment Opportunity Commission alleging the same thing. Since the filing of the Circuit Court action here, Hill has filed further charges with the Equal Employment Opportunity Commission. Hill's attempts to distinguish her case from *Gilmer* would require this court to reverse the factual findings of the Jefferson Circuit Court and the Kentucky Court of Appeals that Hill's claims against Hilliard-Lyons arose out of her employment relationship. (Hill petition at 14-18). Hill states:

> The Court of Appeals analysis, that Hill's sexual harassment claims arise out of her employment because they 'relate' to the company's action taken in response to her report, is therefore wrong as a matter of law. Unlawful conduct can plainly 'relate to' a person's employment, but not constitute a dispute 'arising out of' that employment. (Hill Petition at 17).

This analysis is simply hair splitting. If Jane Hill had not been employed by Hilliard-Lyons, but was raped by Brab while both were on a social outing, she would not have any claim against Hilliard-Lyons. If Brab was not employed by Hilliard-Lyons, Hill would have no claim against Hilliard-Lyons. Likewise, had Hill never reported to Hilliard-Lyons officials that she had been allegedly raped

by Brab, her claim against Hilliard-Lyons would fail. *Nash v Electro Space Systems,* 9 F.3d 401(5th Cir., 1993).[1]

All of Hill's claims against Hilliard-Lyons, Stone, and Pamplin are clearly related to and arise out of her employment relationship with them.[2] Hill's separate claim that Hilliard-Lyons performed an inadequate investigation and retaliated against her can only arise out of her employment. The fact that Hilliard-Lyons was investigating it at all was only because both she and Brab were employed by Hilliard-Lyons. The underlying rape allegation against Brab does not mean that Hill's claims against Hilliard-Lyons arose out of that rape. Absent the employment relationship, Hill's claims against Hilliard-Lyons don't exist. The lower court's factual findings in this regard should not be disturbed.

B. Hill Inferentially Asks This Court to Overrule *Gilmer*

Knowing that it is unlikely that this Court can be convinced to overrule a precedent made just six years ago, Hill doesn't specifically ask the Court to overrule *Gilmer*. But, Hill inferentially invites the Court to do so. Hill argues that "this case presents an important and unsettled question of federal law...," and further states that "the legal status of employer mandated arbitration of employ-

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[1]It is doubtful that a single allegation of non-consensual sex by an employee against her supervisor following an evening of drinking away from the work place constitutes actionable sexual harassment by the employer given the almost impossible task of proving that the alleged rape fell within the scope of the supervisor's authority. *Steele* v. *Offshore Ship Building, Inc.* 867 F.2d 1311 (11th Cir., 1989).

[2]Indeed, Hill alleges that after she reported the alleged rape to Stone, he made certain sexually based remarks to her in his office clearly arising out of employment.

ment disputes is and will remain unsettled." (Petition at 5).[3] Remarkably, in the very next sentence Hill states that "[f]ollowing *Gilmer*, the Courts have with virtual unanimity enforced mandatory arbitration of employment disputes in a variety of situations." (Petition at 5). If the courts have been unanimous, the question arises what is unsettled other than the constantly changing political landscape? At the very end of the same section, Hill asks the question she wants the Court to resolve: "... this Court should promptly address the question of whether mandatory arbitration agreements are permissible as a condition of employment under the FAA." (Petition at 10). For securities industries employees, this Court answered this question in *Gilmer*.

To support her position that the Court should revisit Gilmer, Hill cites a litany of reports from organizations that disagree with this Court's holding in *Gilmer*. Hill cites a proposal by the National Association of Securities Dealers to amend the U-4 form by permitting employees to exercise a choice between arbitration and litigation of employment related disputes. But Hill doesn't mention that New York Stock Exchange Rule 347 also requires arbitration of disputes such as Hill's. The Equal Employment Opportunity Commission (EEOC) also disagrees with this Court's holding in *Gilmer*. Of course this is not the first time that the EEOC has disagreed with this Court. See generally, *General Electric Company v Gilbert*, 429 U.S. 125, 140-145 (1976). Additionally, Hill cites criticism of mandatory arbitration from the National Academy of Arbitrators, the Dunlap Commission, and "numerous arbitrators."

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[3]Hill engages in a bit of legerdemain by characterizing the U-4 as employer mandated arbitration of employment disputes. Hilliard-Lyons is not the author of the U-4. Hill executed the U-4 to secure a registration with regulatory agencies.

Disagreement with this Court's opinion in *Gilmer* does not make the law "unsettled." It creates no compelling justification for this Court to revisit *Gilmer*. After all, the political opposition arrayed against this Court's decision in *Gilmer* is hardly comparable to the political firestorms whipped up by prior decisions of this Court.[4]

In any event, political opposition to a decision of this Court does not justify changing the law. The Court doesn't take easy cases, nor does it decide cases by licking a finger and putting it to the wind. Those who disagree with this Court's decision have a remedy with the legislature. Many interest groups passionately disagreed with this Court's decision in *General Electric Company v Gilbert*, supra. Those interest groups convinced Congress to change the law, which it did with the enactment of the Pregnancy Discrimination Act of 1978, 42 U.S.C. Sec. 2000e(k).

Indeed, this Court decided *Gilmer* on May 13, 1991. Just six months later, on November 21, 1991, Congress enlarged the remedies available to complainants in cases of employment discrimination. 42 U.S.C. Sec. 1981a. As part of that same enactment, Congress amended Title VII of the Civil Rights Act of 1964 by: 1) easing the burden of proof in disparate impact cases, 42 U.S.C. Sec 2000e-2(k); 2) prohibiting the adjustment of test scores or using different scores based on impermissible criteria, 42 USC Sec 2000e-2(l); 3) making the consideration of race, color, sex and national origin in employment practices impermissible, even if other legitimate motivating factors existed, 42 USC Sec 2000e-2(m); and, 4) setting specific standards for challenges to employment practices that are mandated by consent judgments or other orders of lower courts, 42 USC 2000e-2(n).

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[4]*Marbury v Madison*, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803); *Brown v Board of Education*, 347 U.S. 483 (1954); *Roe* v. *Wade*, 410 U.S. 113 (1973).

At any rate, Congress could have acted; it has not done so. There are no compelling reasons for this Court to revisit its decision in *Gilmer*. As Hill points out, the lower courts have a uniform interpretation and understanding of what this Court's decision in *Gilmer* meant and how it should be applied. There is no split among the lower appellate courts on any important issue in this case.

C. Hill Waived Her Right to Assert That Her Agreement to the U-4 Was Not Knowing or Voluntary.

At pages 9 and 10 of her petition, Hill argues that the waiver of her statutory right must be both "knowing and voluntary" citing *Prudential Insurance Co.* v. *Lai*, 42 F. 3rd 1299 (11th Cir., 1994), cert. denied 116 S.Ct. 61 (1995). Before filing this petition Hill never claimed that her waiver of her right to a judicial forum was not knowing or involuntary. It was not alleged in her complaint filed in Circuit Court. In the briefs filed with the circuit court and the Kentucky Court of Appeals she does not argue or assert that she did not know and did not voluntarily assent to waiving her right to a judicial forum instead of an arbitral one. None of the lower courts addressed the issue that she now raises for the first time with this Court - that her waiver of her right to a judicial forum in the U-4 was not knowing or voluntary. This Court traditionally refuses to consider issues that have not been raised or argued in the lower court, and should decline the opportunity to do so here. *Youakim v Miller*, 425 U.S. 231, 234 (1976); *United States v Mendenhall*, 446 U.S. 544, 551-2 (1980).

There are other compelling reason why this case would be an inappropriate vehicle for this Court to announce standards for determining the effectiveness of the U-4's waiver. In the U-4 Jane Hill executed, which was a part of the record below, she indicates that she was a paralegal for a law firm of Barnett and Alagia. She was an instruc-

tor in corporate law at Sullivan Junior College. Hill's husband is a lawyer. She is hardly the type of person who can assert that her waiver is not voluntary. For all of the aforesaid reasons, Hill's petition for writ of certiorari should be denied.

CONCLUSION

The waiver of a judicial forum in favor of an arbitral one was not mandated by an agreement drafted or required by Hilliard-Lyons. It is a document that must be filled out if Jane Hill or any other person wishes to work in the securities industry and to trade on the New York Stock Exchange. As held in *Gilmer,* the U-4's agreement to arbitrate effectively waives the right to use a judicial forum for employment related disputes. Hill reported the alleged rape to her employer, sought protection from her employer, alleged that her employer retaliated, failed to investigate, and violated the Equal Pay Act. Thus, all of Hill's claims against Hilliard-Lyons, Stone and Pamplin arise out of her employment relationship with them. Hill did not argue in the lower court that her execution of the U-4 was not a knowing and voluntary waiver of her right to a judicial forum in favor of an arbitral one.

For the forgoing reasons, the petition for writ of certiorari should be denied.

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